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No. 06-634

IN THE

Supreme Court of the United States

MAUREEN FASANO,

Petitioner,

v.

FEDERAL RESERVE BANK OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a writ of certiorari should be granted where the Third Circuit correctly found that federal law preempts the application of two New Jersey employment statutes to the Federal Reserve Bank of New York, because these New Jersey statutes impose far greater substantive and procedural rights and remedies than corresponding federal law, and thereby frustrate Congressional intent to provide Federal Reserve Banks with broad employment discretion in the performance of their federally mandated central banking functions.

2. Whether a writ of certiorari should be granted where the Third Circuit Opinion is in harmony with this Court's preemption jurisprudence and does not conflict with any decision of a Court of Appeals or state court of last resort.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Federal Reserve Bank of New York ("New York Fed") is a corporation chartered under the laws of the United States pursuant to the Federal Reserve Act of 1913, 12 U.S.C. § 221 *et seq.* The New York Fed, a corporate instrumentality of the United States government, has no parent company, nor does it have any subsidiaries or affiliates. Stock of the New York Fed is owned by member commercial banks within the Second Federal Reserve District. The stockholders, however, do not control the New York Fed. Stock of a Federal Reserve Bank is acquired because its ownership is a condition of membership in the Federal Reserve System. Federal Reserve Bank stockholders do not possess a residual equity interest in Reserve Bank assets. That residual interest remains always with the United States.

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SUMMARY OF REASONS TO DENY THE PETITION

The Supremacy Clause mandates that federal law "shall be the Supreme law of the Land . . . [the] Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. This case concerns whether the Supremacy Clause permits a plaintiff to bring claims against a Federal Reserve Bank and its employees under state employment laws that provide greater substantive and procedural rights and remedies than the corresponding federal laws. The Third Circuit, like every other Court of Appeals that has considered this issue, has found that the "dismiss at pleasure" provision of the Federal Reserve Act, 12 U.S.C. § 341 (Fifth) ("Section 341 (Fifth)"), preempts the application of such laws to Federal Reserve Banks and their employees.

Petitioner has presented no compelling reasons why her Petition for a Writ of Certiorari ("Petition" or "Pet.") should be granted. First, Petitioner fails to demonstrate that the Third Circuit's August 3, 2006 Opinion and Order ("Third Circuit Opinion") conflicts with a decision of this Court, or that the Third Circuit decided an important federal question that should be settled by this Court. Second, Petitioner fails to demonstrate that the Third Circuit Opinion conflicts with a decision of another Court of Appeals or a state court of last resort.

Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. THE PARTIES

A. The New York Fed

The New York Fed is one of twelve Federal Reserve Banks chartered pursuant to the Federal Reserve Act of 1913 ("FRA"), 12 U.S.C. § 221 *et seq.* Congress created the Federal Reserve to serve as the central bank of the United States. The Federal Reserve consists of the twelve Federal Reserve Banks, the Board of Governors of the Federal Reserve System ("Board of Governors"), and the Federal Open Market Committee ("FOMC"). The Board of Governors, which consists of seven members nominated by the President and confirmed by the Senate, *see* 12 U.S.C. § 241, and the FOMC are both independent agencies of the United States government. The New York Fed, together with the other eleven Federal Reserve Banks, constitutes the operational component of the nation's central bank.

Federal law sets forth the power and authority of the Federal Reserve Banks. Through its employees, each Federal Reserve Bank, including the New York Fed, performs a myriad of central banking functions prescribed by federal law that are designed to develop, implement and foster the monetary and fiscal objectives of the United States to serve the public interest. The functions performed by Federal Reserve Banks require a high degree of uniformity in order to ensure consistent application of national policy.

First, Federal Reserve Banks issue and distribute the nation's legal tender, Federal Reserve Notes. *See* 12 U.S.C. § 341 (Eighth). This function is particularly relevant, because

Petitioner worked in the New York Fed's cash issuance and processing operation. (*See* Pet. at 6.)

Second, Federal Reserve Banks act as the banker for the United States government. As such, the New York Fed is a depository of U.S. government funds. *See* 12 U.S.C. § 391. The New York Fed acts as fiscal agent for the United States Department of the Treasury ("Treasury"), such as by issuing and redeeming U.S. government securities. *See id.* The New York Fed also serves as the international operating arm of the Federal Reserve, maintaining accounts for foreign central banks and conducting certain investment and trading activities on their behalf.

Third, the Federal Reserve establishes U.S. monetary policy through the FOMC, whose mandate is to direct and regulate the execution of that policy to serve the goals of "maximum employment, stable prices, and moderate long-term interest rates." 12 U.S.C. § 225a. The New York Fed executes federal monetary policy as contemplated by federal law through "open-market operations," where the New York Fed purchases and sells government securities. *See* 12 U.S.C. § 263(b). The money that is paid or received as a result of these operations respectively restricts or expands the nation's money supply.

Fourth, Federal Reserve Banks carry out federal banking policy and ensure the safety and soundness of the nation's banking system. Federal Reserve Banks supervise various financial institutions within their regional Federal Reserve Districts, pursuant to power delegated by the Board of Governors. *See* 12 U.S.C. §§ 248(k), 325, 338, 625, 1844(c), 3105; 12 C.F.R. § 265.2.

Fifth, federal law sets uniform reserve requirements to ensure the solvency of depository institutions, and requires that these reserves are to be held by the Federal Reserve Banks. *See* 12 U.S.C. § 461; 12 C.F.R. pt. 204. In addition, federal law provides for Federal Reserve Banks to maintain a liquid banking system by acting as lender of last resort through Discount Window loans. *See* 12 U.S.C. §§ 343-52, 461(b)(7); 12 C.F.R. pt. 201.

Pursuant to federal law, each Federal Reserve Bank must operate within the territorial boundaries of its Federal Reserve District. Consequently, Federal Reserve Banks do not have the choice of where they do business, and thus to which state laws they would be subject. Each of the twelve Federal Reserve Districts spans multiple states, and all but one span multiple federal judicial circuits. *See* 12 U.S.C. § 222; 91 Fed. Res. Bull. 312 (2005); *http://www.federalreserve.gov/otherfrb.htm* (displaying map of the twelve Federal Reserve Districts). The New York Fed is located in the Second Federal Reserve District, which consists of New York, Puerto Rico, the United States Virgin Islands, and parts of New Jersey and Connecticut. Rules of Organization § 3(a), III Fed. Res. Reg. Serv. ¶ 8-012; 91 Fed. Res. Bull. 312 (2005).

Unlike companies engaged in private enterprise, Federal Reserve Banks do not seek profits, but are required to transfer their net earnings to the Treasury. *See* 12 U.S.C. § 290. The United States always retains the residual capital interest in the Federal Reserve Banks. *See id.* Congress has on occasion treated the Federal Reserve Banks as the government's own rainy day fund, directing, for example, the payment of over $3.7 billion to the Treasury in 2000. *See* 12 U.S.C. § 289. *See also* Pub. L. No. 103-66, § 3002(b), 107 Stat. 337 (1993) (directing payment of $106 million to Treasury in 1997 and $107 million in 1998).

B. Petitioner

Petitioner is a former employee of the New York Fed. (*See* Appendix to Petition ("App.") at 5a-6a.) Petitioner worked in the New York Fed's cash issuance and processing operation, conducted out of the New York Fed's operations center in East Rutherford, New Jersey, from October 2000 through December 2001, when she went out on paid medical leave for an injury she allegedly sustained at work. (App. at 6a.) Petitioner was terminated on July 31, 2002 after she failed to either return to work or file an application for disability benefits. (*Id.*)

II. PROCEDURAL HISTORY

A. The Complaint

On or about December 19, 2002, Petitioner filed suit in New Jersey Superior Court against the New York Fed and seven New York Fed employees. Petitioner's claims arise solely under two New Jersey employment statutes, namely, the Conscientious Employee Protection Act ("CEPA"), N.J. Stat. Ann. § 34:19-1 *et seq.*, and the New Jersey Law Against Discrimination ("LAD"), N.J. Stat. Ann. § 10:5-1 *et seq.* Petitioner alleged that her "handicaps" under the LAD are neck and back injuries, and diabetes treatable with moderate modifications in diet. (App. at 6a.) On February 14, 2003, Respondents removed the action to the United States District Court for the District of New Jersey pursuant to 12 U.S.C. § 632, the FRA's removal provision, which provides that all suits against Federal Reserve Banks are deemed to "arise under the laws of the United States."

B. The Motion to Dismiss

In June 2003, Respondents moved to dismiss the Complaint. Among other things, Respondents sought dismissal pursuant to Fed. R. Civ. P. 12(b)(1) on federal preemption grounds because the FRA conflicts with and thus preempts the application of the LAD and CEPA to a Federal Reserve Bank. As Respondents explained in their motion, this is so for two reasons. First, Federal Reserve Banks, including the New York Fed, are instrumentalities of the United States performing federal functions and are presumptively immune from state regulation unless Congress has explicitly authorized that regulation. Second, even under traditional preemption analysis, Petitioner's LAD and CEPA claims are preempted by the FRA because the LAD and CEPA conflict with federal law and frustrate Congressional intent to provide Federal Reserve Banks with wide latitude in their employment decisions.

The District Court initially denied Respondents' motion in an order dated March 31, 2004, but later certified its decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (*See* App. at 31a.)

III. THE THIRD CIRCUIT OPINION

On August 3, 2006, the Third Circuit issued a unanimous opinion reversing the District Court's March 31, 2004 order. The Third Circuit analyzed the LAD and CEPA under the traditional preemption analysis set forth in *English v. General Electric Co.*, 496 U.S. 72 (1990), and recognized that these state statutes far exceeded the substantive, procedural, and remedial provisions of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the federal

whistleblower protection statute, 12 U.S.C. § 1831j ("Section 1831j"). The Third Circuit held that the expansive scope of the LAD and CEPA "frustrates the Congressional purpose behind § 341(Fifth), as impliedly amended by the ADA and 12 U.S.C. § 1831j," and that the LAD and CEPA were thus preempted by federal law. (App. at 25a n.10.)

Because the Third Circuit found the *English* preemption analysis to be dispositive, the court did not find it necessary "to reach the broader, albeit amply supportable, conclusion that the New York Fed is a federal instrumentality."[1] (App. at 14a.) The Third Circuit noted, however, "that strong arguments have been made in favor of such status," and that, in the case of federal instrumentalities, state law is preempted absent express Congressional authorization to the contrary. (App. at 12a.) The Third Circuit thus suggested independent grounds for finding that the LAD and CEPA are preempted with respect to the New York Fed and its employees based on the instrumentality status of the New York Fed.

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1. The concept that Federal Reserve Banks are instrumentalities of the United States for purposes of preemption analysis is as old as Supremacy Clause analysis itself. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436-37 (1819) (Bank of the United States, the predecessor to the Federal Reserve, was an "instrument" of the U.S. and should be treated like the sovereign for purposes of preemption analysis). *See also U.S. Shipping Bd. Emergency Fleet Corp. v. W. Union Telegraph Co.*, 275 U.S. 415, 425-26 (1928) (recognizing Federal Reserve Banks as federal "instrumentalities").

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT OPINION IS IN HARMONY WITH THIS COURT'S PREEMPTION JURISPRUDENCE

The Third Circuit Opinion is in harmony with one of this Court's most venerable precedents, *McCulloch v. Maryland*. In *McCulloch*, the Court considered whether a Maryland statute could be applied to the Bank of the United States, the nation's central bank. The Court held that states have no power "to retard, impede, burden, or in any manner control" the operations of the nation's central bank absent express Congressional authorization. *McCulloch*, 17 U.S. (4 Wheat.) at 436.

The Federal Reserve Act created Federal Reserve Banks, the modern-day successor to the Bank of the United States. *See Melcher v. Fed. Open Mkt. Comm.*, 644 F. Supp. 510, 521-22 (D.D.C. 1986), *aff'd*, 836 F.2d 561 (D.C. Cir. 1987) (recounting the history of the nation's central bank). Congress intended the Federal Reserve Banks to play a major role in developing, implementing and fostering the monetary and fiscal policies of the United States. *See* Board of Governors of the Federal Reserve System, *The Federal Reserve System: Purposes & Functions* at 6-11 (9th ed. 2005), *available at http://www.federalreserve.gov/pf/pf.htm*.

Congress intended Section 341 (Fifth) "to allow the federal reserve banks the 'greatest latitude possible' in terminating their employees" in order to maintain the public trust. *Evans v. Fed. Reserve Bank of Phila.*, No. Civ.A.03-4975, 2004 WL 1535772, at *5 (E.D. Pa. July 8, 2004) (citing *Talbott v. Bd. of County Comm'rs of Silver Bow County*, 139 U.S. 438, 443 (1891) (noting Congressional intent to create

national banking system with "uniform operation"); *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 526 (9th Cir. 1989)).

Petitioner argues that the LAD and CEPA are not preempted because the ADA applies to the New York Fed, and the ADA "itself purports to *preserve* state laws that provide greater protections for disabled employees." (Pet. at 22.) This Court has rejected Petitioner's "double saving clause" argument as "simplistic." *Shaw v. Delta Air Lines*, 463 U.S. 85, 101 n.22 (1983).[2] As the Court recognized, "the double saving clause argument, taken to its logical extreme, would save almost all state laws from pre-emption." *Id.* The Court soundly rejected this approach. *Id.* The Third Circuit Opinion followed suit, noting:

> [i]t would be a mistake . . . to argue that because the *ADA* preempts neither the Federal Reserve Act nor CEPA or LAD, the *Federal Reserve Act* cannot have such preemptive force.

(App. at 25a n.10.)

Petitioner also argues that Congress did not intend Section 341 (Fifth) to preempt state law because "that provision actually says not one word about state law." (Pet. at 24.) Under Petitioner's view, a court would look only

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2. Petitioner tries to distinguish *Shaw* by pointing out that the federal statute in that case included an explicit preemption provision. (*See* Pet. at 25 n.6) This point, however, is irrelevant. Regardless of whether preemption is express or implied, a court must examine Congressional intent. *See English*, 496 U.S. at 78-79 ("Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.") (internal citation omitted).

to whether Congress has expressly preempted a state law, thereby ignoring the well-settled tenets of field and conflict preemption. *See, e.g., English*, 496 U.S. at 79 ("in the *absence of explicit statutory language*, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively" or "to the extent that it actually conflicts with federal law") (emphasis added).

Petitioner claims that the Third Circuit held that the LAD and CEPA were preempted "simply because they provided ***remedies*** or procedures that varied from federal employment laws."[3] (Pet. at 25.) To the contrary, the Third Circuit held that the LAD and CEPA go far beyond their federal analogs with respect to both remedies *and* substantive protections. (*See* App. at 26a-28a.)

Lastly, Petitioner argues that the Third Circuit made a "*radical* departure from this Court's jurisprudence by holding that *any* purported 'conflict' required the state law to be preempted in its entirety" and by refusing to "pare back" the LAD and CEPA to exactly match their federal analogs. (Pet. at 27 (emphasis added).) Again, Petitioner is incorrect.

The Third Circuit exercised proper judicial restraint by refusing to rewrite language enacted by the New Jersey legislature, and thus properly dismissed Petitioner's LAD and CEPA claims. *See United States v. Albertini*, 472 U.S. 675, 680 (1985) ("Statutes should be construed to avoid constitutional questions, but this interpretative canon is not

3. Petitioner relies on cases that considered, in the absence of a federal remedy, the preemption of state causes of action that seek to enforce federal requirements, such as with respect to package labeling. (*See* Pet. at 25-26.) Those cases are inapposite because Petitioner is not seeking to enforce any federal requirement.

a license for the judiciary to rewrite language enacted by the legislature."). *See also Sperry v. Fla. ex rel. Fla. Bar*, 373 U.S. 379, 384 (1963) (state law "must yield when incompatible with federal legislation") (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (internal quotation omitted)).

The Third Circuit Opinion is in perfect harmony with relevant decisions of this Court. Therefore, this Court should deny the Petition. *See* Sup. Ct. R. 10(c).

II. THERE ARE NO CIRCUIT OR STATE COURT CONFLICTS WARRANTING CERTIORARI

Petitioner attempts to portray a deepening divide among the courts that have considered the preemptive effect of the "dismiss at pleasure" provisions of the "federal Bank Acts."[4] (*See* Pet. at 13-19.) Contrary to Petitioner's suggestion, the Third Circuit Opinion represents a growing consensus as to the proper preemption analysis with respect to Section 341 (Fifth).

A. There Is No Inter-Circuit Conflict

Petitioner argues that four Circuits—the Third, Fourth, Sixth, and Ninth Circuits—"have now developed at least three divergent approaches to whether the 'dismiss at pleasure' language preempts state employment laws, leaving

4. Congress included virtually identical "dismiss at pleasure" provisions in the FRA, Section 341 (Fifth); the National Bank Act ("NBA"), 12 U.S.C. § 24 (Fifth) ("Section 24 (Fifth)"); and the Federal Home Loan Bank Act ("FHBLA"), 12 U.S.C. § 1432(a).

the jurisprudence in this area in considerable disarray." (Pet. at 3.) This is incorrect.[5]

Every Court of Appeals that has addressed this issue has uniformly found that the FRA's "dismiss at pleasure" provision (as well as the analogous provisions in the NBA and FHLBA), at a minimum, preempts state employment laws like the LAD and CEPA, which provide greater substantive and procedural rights and remedies than corresponding federal laws.[6] No federal appellate court has concluded that any Federal Reserve Bank anywhere is subject to state employment laws that provide greater substantive or procedural rights or remedies than federal

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5. In fact, earlier this term, the Court denied a petition for certiorari in *Kroske v. US Bank Corp.*, 432 F.3d 976 (9th Cir.), *cert. denied*, 127 S. Ct. 157 (2006), which alleged conflicts between Circuit and state courts—including conflicts with the Third Circuit Opinion—nearly identical to those asserted in the instant Petition.

6. Petitioner argues that the Third Circuit Opinion also conflicts with district court decisions on this issue. This argument is inapposite. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 237 (8th ed. 2002) ("The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit.").

Nonetheless, nearly every district court that has considered this issue has held that the "dismiss at pleasure" provisions in the FRA, NBA and FHLBA preempt state employment laws like the LAD and CEPA, which provide greater substantive and procedural rights and remedies than corresponding federal laws. (*See* App. at 22a-23a (discussing cases).)

law.[7] Even Petitioner concedes that every Court of Appeals that has addressed the preemptive scope of the "dismiss at pleasure" provisions has agreed, at a minimum, that these provisions preempt state employment law "*to the extent there [are] any significant variations between state and federal law.*" (Pet. at 17 (emphasis added).)

The only difference is the method used to reach the same result. As discussed in more detail below, the Fourth and Sixth Circuits have taken a broader approach to the instant preemption analysis, while the Third and Ninth Circuits have adopted a narrower approach. This difference does not rise to the level of conflict necessary to merit a grant of certiorari. *See* Stern *et al.*, *supra* note 6, at 225 (to justify a grant of certiorari, "there must be a real or 'intolerable' conflict on the same matter of law or fact").

1. *The Broader Approach*

The Fourth and Sixth Circuits have adopted the broader approach that the "dismiss at pleasure" language preempts *all* employment rights created by state law. *See Arrow v. Fed.*

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7. By omitting relevant portions of quotations or taking quotations out of context, Petitioner mischaracterizes Respondents' briefs below to claim that the New York Fed has conceded the existence of a conflict on the instant preemption issue. (*See, e.g.*, Pet. at 8, 10, 13.) Petitioner is wrong. Respondents have always recognized that the Courts of Appeals are in harmony with respect to the "dismiss at pleasure" provisions' preemptive effect on state laws that provide greater substantive and procedural rights and remedies than federal anti-discrimination laws. Respondents argued below that the District Court's decision stood in direct conflict with the holdings of other Circuits and of district courts within the Third Circuit on important Constitutional issues. The Third Circuit Opinion has now resolved this conflict.

Reserve Bank of St. Louis, 358 F.3d 392, 393 (6th Cir. 2004) (affirming dismissal of plaintiff's Kentucky employment law claims against Federal Reserve Bank because Section 341 (Fifth) "applies to preempt state employment rights"); *Andrews v. Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 220 (4th Cir. 1993) (FHLBA "dismiss at pleasure" provision preempts state employment law claims against Federal Home Loan Banks); *Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928, 931 (6th Cir. 1987) (FRA "dismiss at pleasure" provision "preempts any state-created employment right" against a Federal Reserve Bank). *See also Sheehan v. Anderson*, 263 F.3d 159 (3d Cir. 2001), *aff'g*, No. 98-5516, 2000 WL 288116, at * 5 (E.D. Pa. Mar. 17, 2000) (summarily affirming district court holding that Section 341 (Fifth) "preempts any state created employment right").

The Third Circuit here declined to take a position with respect to the approach adopted by the Fourth and Sixth Circuits, because it was not necessary to consider "whether state remedies exactly consonant with the ADA and 12 U.S.C. § 1831j would similarly offend 'the full purposes and objectives of Congress'" in order to decide the appeal. (App. at 25a.)

2. *The Narrower Approach*

Here, the Third Circuit followed the preemption analysis employed by the Ninth Circuit in *Kroske v. US Bank Corp.* (*See* App. at 23a (finding Ninth Circuit approach "persuasive").) The Third and Ninth Circuits found that the "dismiss at pleasure" provisions of the FRA, NBA and FHLBA do not preempt state employment laws that are *consistent* with federal anti-discrimination laws, but do preempt any state employment laws that are *inconsistent*—

i.e., that provide more expansive rights and remedies than those available under federal law.

a. *Ninth Circuit Jurisprudence*

The Ninth Circuit articulated this approach in *Kroske*, where it considered whether age discrimination claims against a national bank under the Washington Law Against Discrimination ("WLAD") were preempted by the NBA's "dismiss at pleasure" provision, Section 24 (Fifth). The Ninth Circuit noted that Section 24 (Fifth) conflicted with the later-enacted Age Discrimination in Employment Act ("ADEA"). *Kroske*, 432 F.3d at 987-88. The Ninth Circuit concluded that the "dismiss at pleasure" provision of Section 24 (Fifth) was impliedly amended, "but only to the extent necessary to give effect to the ADEA," and no further. *Id.* at 987.

The Ninth Circuit then considered whether Section 24 (Fifth), as impliedly amended by the ADEA, preempted the WLAD claims in question. The Ninth Circuit recognized that Congress intended "to create a national banking system with uniform and universal operation through the entire territorial limits of the country." *Id.* at 989 (internal citation and quotation omitted). The court acknowledged that state anti-discrimination law that is not consistent and is more expansive than federal anti-discrimination law "may frustrate the congressional purpose of uniform regulation" of banking across the nation. *Id.* The court held that only state employment laws that "substantively mirror[]" federal anti-discrimination law may be applied. *Id.*

The Ninth Circuit concluded that the WLAD claim in question was not preempted by the NBA "dismiss at pleasure" provision because the WLAD provision at issue "mirrors the

substantive provisions of the ADEA and is interpreted consistently with the ADEA." *Id.* at 987. However, the court held that the NBA "dismiss at pleasure" provision did preempt the application of state anti-discrimination law that is more expansive than federal law. *Id.* at 987-89. The court also reaffirmed several of its past decisions that go at least this far.[8] *Id.* at 984-85. *See Walleri v. Fed. Home Loan Bank of Seattle*, 83 F.3d 1575, 1582 (9th Cir. 1996) (FHLBA's "at-pleasure" provision preempted state wrongful discharge claim); *Mackey*, 867 F.2d at 526 (state tort claims against national bank are preempted by Section 24 (Fifth)); *Inglis v. Feinerman*, 701 F.2d 97, 99 (9th Cir. 1983) (FHLBA's "at-pleasure" provision preempted state wrongful discharge claim); *Bollow v. Fed. Reserve Bank of S.F.*, 650 F.2d 1093, 1098 (9th Cir. 1981) (Federal Reserve Bank employee's claims alleging right to pre-termination hearing under state law conflicted with and were preempted by Section 341 (Fifth)).

b. *The Third Circuit Opinion*

Like the Ninth Circuit in *Kroske*, the Third Circuit applied the traditional preemption analysis set forth by this Court in *English*. (*See* App. at 9a, 16a.) The Third Circuit observed that "Congress has clearly expressed the intent to grant the broadest possible power and right to dismiss

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8. Petitioner mistakenly claims that *Kroske* held that the "dismiss at pleasure" language was limited only to contractual claims. (*See* Pet. at 16.) Petitioner, however, ignores the Ninth Circuit's lengthy discussion of how the "dismiss at pleasure" language preempts *both* contract and tort claims, including wrongful discharge claims. *See Kroske*, 432 F.3d at 984-85. Further, the Ninth Circuit explicitly recognized that the "dismiss at pleasure" language could preempt "state law prohibitions against discriminatory termination that are not consistent with federal anti-discrimination laws." *Id.* at 989.

employees" to Federal Reserve Banks, entities that are "undeniably crucial to the federal monetary system." (*Id.* at 25a.) The Third Circuit noted that the ADA and Section 1831j impliedly amended Section 341 (Fifth) by limiting a Federal Reserve Bank's power to dismiss its employees on grounds prohibited by the later-enacted federal anti-discrimination laws, but no further. (*Id.* at 19a-20a.)

The Third Circuit concluded that Section 341 (Fifth), as impliedly amended by the ADA and Section 1831j, "preempts *any* state employment law that goes beyond the remedies and protections provided by those federal laws," because such provisions "conflict with Congress's intent to provide Federal Reserve Banks with the broadest latitude possible in carrying out their statutory duties, while giving due recognition to the applicability of the ADA and 12 U.S.C. § 1831j's requirements" and thus "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Id.* at 24a (internal quotation and citation omitted).)

Both the Third and Ninth Circuits allow the application of state employment laws that mirror federal law, and preempt state employment laws that do not. Contrary to Petitioner's suggestion, the Third and Ninth Circuits are in harmony with respect to their preemption methodology.

3. *Petitioner's Claims Are Preempted Under Either the Broader or the Narrower Approach*

The Third Circuit noted the clear differences between the ADA and Section 1831j, on the one hand, and the LAD and CEPA, on the other. (*See* App. at 26a-29a.) The LAD protects individuals with temporary and insubstantial

impairments, while the ADA only protects individuals with impairments that substantially limit one or more major life activities. *See Failla v. City of Passaic*, 146 F.3d 149, 154 (3d Cir. 1998) (recognizing inconsistent standards between "the [LAD's] definition of 'handicapped,' as compared to the [ADA's] definition of 'disability'"); *Soules v. Mount Holiness Mem'l Park*, 808 A.2d 863, 866 (N.J. Super. Ct. App. Div. 2002) ("LAD's definition of handicap, and its scope, is not comparable to the definitions and scope of handicap or disability under the ADA").[9]

Importantly, the very conditions Plaintiff alleges in her LAD claims—neck and back injuries and diabetes treatable with moderate modifications in diet (App. at 6a)—are not disabilities entitled to protection by the ADA. *See Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999) (disability exists only where an impairment substantially limits a major life activity, not where it might be limiting if mitigating measures were not taken); *Marinelli v. City of Erie, Pa.*, 216 F.3d 354, 362-63 (3d Cir. 2000) (neck and arm pain that rendered

9. The definition of "handicap" or "disability" under the LAD may encompass conditions expressly excluded from the ADA's definition of "disability," such as gender identity disorders, paraphilia, and drug addiction. *Compare* 42 U.S.C. §§ 12114(a), 12208 & 12211(b) (transsexualism, exhibitionism, pedophilia, voyeurism, transvestitism and drug addiction excluded from ADA's definition of disability) *with Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 374-77 (N.J. Super. Ct. App. Div. 2001) (transsexualism can qualify as handicap under LAD because unlike the ADA, the LAD "is very broad" and does not require condition to "restrict any major life activities to any degree") *and A.B.C. v. XYZ Corp.*, 660 A.2d 1199, 1200 (N.J. Super. Ct. App. Div. 1995) ("handicap" under LAD may include mental illness of a psychosexual variety, like exhibitionism) *and In re Cahill*, 585 A.2d 977, 978-79 (N.J. Super. Ct. App. Div. 1991) (LAD recognizes morphine abuse as a handicap).

plaintiff unable to lift objects greater than ten pounds, operate snow plow or do household chores did not render plaintiff "disabled" under ADA because impairment did not substantially limit a major life activity); *Failla*, 146 F.3d at 152 (plaintiff's back condition determined at trial to be handicap under the LAD, but *not* disability under the ADA); *Schaefer v. State Ins. Fund*, 207 F.3d 139, 142-43 (2d Cir. 2000) (non-insulin dependent diabetes, when medicated, did not meet definition of disability under ADA absent substantial limitation of major life function).

CEPA is also broader in scope than the federal whistleblower protection statute. Section 1831j only protects against retaliation for disclosing circumscribed types of suspected wrongdoing to a circumscribed list of entities. CEPA, in contrast, "permits an employee to complain to *any* public body about virtually any topic, even those within the employee's own control." (App. at 28a (internal citation omitted).) *See also Hernandez v. Montville Twp. Bd. of Educ.*, 808 A.2d 128, 132 (N.J. Super. Ct. App. Div. 2002), *aff'd*, 843 A.2d 1091 (N.J. 2004) (school custodian's complaints that it took a week for clogged toilet to be repaired and single light bulb to be changed were cognizable under CEPA, even though these repairs lay within custodian's own area of responsibility). In fact, CEPA has been described as the "most far reaching whistleblower statute in the nation." *Blackburn v. United Parcel Serv.*, 3 F. Supp. 2d 504, 517 (D.N.J. 1998), *aff'd*, 179 F.3d 81 (3d Cir. 1999) (internal quotations and citation omitted).

Moreover, the LAD and CEPA allow for individual liability, while the ADA and Section 1831j do not. (App. at 26a-28a.) *Compare Failla*, 146 F.3d at 158 (adopting the Restatement (Second) of Torts standard for aiding and

abetting liability under the LAD) *and Palladino ex rel. United States v. VNA of S. N.J., Inc.*, 68 F. Supp. 2d 455, 474 (D.N.J. 1999) (holding that CEPA provides for individual liability) *with Koslow v. Commonwealth of Pa.*, 302 F.3d. 161, 178 (3d Cir. 2002) (no individual liability available under the ADA) *and Rouse v. Farmers State Bank of Jewell, Iowa*, 866 F. Supp. 1191, 1203-04 (N.D. Iowa 1994) (no private right of action against individuals under federal whistleblower protection statute).

The LAD further expands the remedies available under the ADA in the area of compensatory and punitive damages. (*See* App. at 27a.) The ADA caps these damages. *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565, 570 (3d Cir. 2002). In contrast, there is no such limit under the LAD. *See Baker v. Nat'l State Bank*, 801 A.2d 1158, 1169 (N.J. Super. Ct. App. Div. 2002).

The LAD and CEPA impose rights and remedies far greater than the applicable federal laws. Therefore, under either the broader or the narrower approaches adopted by the Circuits, Petitioner's LAD and CEPA claims are preempted by federal law.

B. There Is No Conflict with a State Court of Last Resort

Petitioner argues that two state courts of last resort take a different position than the Third Circuit Opinion with respect to the preemptive effect of Section 341 (Fifth).[10]

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10. Petitioner also argues that one lower state court opinion—*White v. Federal Reserve Bank*, 660 N.E.2d 493 (Ohio Ct. App. 1995)—conflicts with the Third Circuit Opinion. (*See* Pet. at 17-18.) A putative conflict with a lone lower state court opinion, however, is not a recognized basis for granting certiorari. *See* Sup. Ct. R. 10.

(*See* Pet. at 17-18.) These claimed differences do not provide the compelling reasons necessary to grant certiorari.

First, the two cases Petitioner relies on did not even involve Section 341 (Fifth) or Federal Reserve Banks.[11] There is unlikely ever to be a conflict between federal and state courts on the interpretation of Section 341 (Fifth). Congress expressly granted federal courts original jurisdiction in any case in which a Federal Reserve Bank is a party, and gave Federal Reserve Banks the right to remove any case to federal court, regardless of whether the case involves a federal question or diversity of citizenship. *See* 12 U.S.C. § 632. Therefore, issues pertaining to Federal Reserve Banks generally have been decided by federal courts.

Second, Petitioner concedes that the "lead opinion" in *Peatros v. Bank of America*, 990 P.2d 539 (Cal. 2000), "appears to mirror the Ninth Circuit's holding in *Kroske*" (Pet. at 18), which, as discussed above, is consistent with the Third Circuit Opinion.

In sum, Petitioner has pointed to no conflict with a Court of Appeals or a state court of last resort that would warrant a grant of certiorari. *See* Sup. Ct. R. 10(a).

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11. Indeed, *Sargent v. Central National Bank & Trust Co.*, 809 P.2d 1298 (Okla. 1991), did not even concern state anti-discrimination laws.

CONCLUSION

Petitioner has not met her burden of establishing a compelling reason for this Court to grant the Petition. Therefore, for the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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